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Supreme Court of the United States

OCTOBER TERM, 1949

NO. 1

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR KANSAS CITY LIFE INSURANCE COMPANY IN REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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STATEMENT

The Government has filed a supplemental brief restating the position taken in its original brief and raising some new questions.

In replying thereto we have not attempted to deal with any questions other than those covered by the Government's supplemental brief. Questions such as our contention that the water was raised above high water level and that Congress by legislation covering this specific project has authorized payment of compensation are fully covered in the original brief.

SUMMARY OF ARGUMENT

I

The paramount power of the United States as to submerged lands on a navigable river does not extend to a small nonnavigable creek far from the river so as to give the United States the right to take without compensation land on such creek. Both Congress and this Court have always recognized such distinction.

To require compensation does not destroy in any practical sense the Government's dominant power. The cost of taking the land in the case at bar is so small compared to the total cost of the project it becomes insignificant.

That a state may grade a highway without paying damage to an adjoining landowner is not analogous to the United States backing water into a nonnavigable small creek thus making a swamp and bog of a farm bordered by such stream. The state would not have the right without paying compensation to change the grade of a privately owned country lane some distance away from the public highway. Even as to a public highway it is doubtful if a state has the right to so block the property adjoining it as to completely isolate and destroy the property. This Court, in the case of *United States* v. *Welch*, 217 U. S. 333, has held that if destruction of a private way deprives an owner of every way to get to the road, this is a taking and compensable. Missouri cases hold likewise. *Christy* v. *Chicago, B. & Q. R. Co.*, 212 S. W. 2d 476, p. 479.

II

An owner of land bordered by a nonnavigable stream owns to the middle of the stream, thus being a riparian owner with the right to have his drainage flow into the stream. The court below found as a fact that Dardenne

Creek bordered the land owned by claimant. Under such finding claimant is a riparian owner. *Bratschi* v. *Loesch*, 330 Mo. 697, 51 S. W. 2d 69.

The contention that surface water is a common enemy under Missouri law and an owner can throw it off or turn it on to his neighbor's land is not well taken under the facts in this case. The rule stated does not apply where one collects the surface water in a body and causes it to be dumped on his neighbor's land, it does not apply where the water thrown back is flowing in a stream with well defined channels as was Dardenne Creek, and it does not apply where the obstacle placed to impede the water is not intended merely to protect against surface water. *Keener* v. *Sharp*, 341 Mo. 1192, 111 S. W. 2d 118.

ARGUMENT

I DOMINANCE OF GOVERNMENT AS TO SUBMERGED LAND ON A NAVIGABLE RIVER DOES NOT EXTEND TO LAND ON A SMALL NONNAVIGABLE STREAM

A. Compensation by Government for Land Taken Does Not Destroy Government's Paramount Power

In the first place this case does not involve the power of the Government to place a dam in the Mississippi River. The dam was completed and put in operation in 1938 without any hindrance and has since been in constant use. The requirement that compensation be made is not a destruction of the Government's power. It is doubtful if in modern times the fact that compensation must be paid for land taken has ever prevented a government from carrying on a needed project. That is illustrated by what was done in this case. Congress had before it a complete picture of the costs of taking the lands involved and ordered the project to proceed. The engineers also knew what was faced and recommended going ahead. That the cost of taking as compared to total cost of the project is not so

high as to be an obstacle is also shown in this case. The engineers themselves recognized this.* All of the other six properties found by the engineers to be low-lying lands for which they recommended that the Government make compensation (R. pp. 24, 25, Fdg. 8) have been paid for.

If payment of compensation is the extraction of all substance to the Government's paramount power, allowing compensation for flooding of fast land should be denied also. There is as much reason for denying liability for taking fast land as there is for denying it on land on a small nonnavigable stream a considerable distance from the river. River traffic cannot move on either. The whole idea of the Government's paramount power over submerged land located on a navigable stream is the qualified title of the owner of the submerged land. This, of course, is based on the fact that this submerged land is part of the navigable stream over which river traffic eventually moves, a fact a purchaser could see and know.

B. Taking Land on a Nonnavigable Stream Without Compensation Is Neither Legal nor Fair

One buying land a mile and a half from the river and on a little creek certainly would not be put on notice that there was a public interest there or that his title might be affected by the claims of navigation. Congress in its legislation and this Court in its decisions have always made a distinction. *United States* v. *Willow River Power Co.*, 324 U. S. 499, pp. 505, 506. Therefore it would not be either legal or fair to take such land without compensation.

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*River and Harbor Committee Document No. 34 (House of Representatives) 73rd Congress, 2nd Session, p. 3.

C. Changing the Grade of a Public Highway Is Not Analogous to Changing the Water Level of a Small Nonnavigable Stream

Counsel for Government also spends some time discussing the right of a city to change the grade of a street without liability. All of the cases cited involve cities. In Missouri, a city is liable for the change of grade of a street within its borders. This is based on statutes making such cities liable. The principle asserted however, that a public highway may be changed in grade by the state without liability to the owner of the adjoining property is correct.

We do not think this is authority for the proposition that a private stream may be altered by the Government of the United States without compensation for the damage done thereby. The public highway corresponds to the navigable stream. Anyone buying property on a public highway knows the public right is superior to his own. But this is not the same as a man owning a private road away from the highway or a private road in common with his neighbor. The private road he can if he desires obstruct with his plow or his tractor without in any way obstructing the movements of the public and if the road is owned jointly and his neighbor consents he can obstruct it in any way he pleases. But certainly the state cannot come in and proceed to grade this private road or put a concrete embankment around it without paying him compensation.

Perhaps a short discussion of grading cases in Missouri might clarify the issue. When a state raises the grade of a public highway in front of property so that it is considerably higher than the adjoining land, it has inconvenienced the owner, it may have damaged him but it has not taken his land. He can always get to town, he can always get to the road, his land is intact. Consequently, the courts have said there is merely damage. But another question arises if the action of the state is such that it

destroys the land. Missouri cases have established this in the circumstances where the landowner is a block away from the street which is graded. Counsel for the Government has referred to these cases. Here, the courts say the owner is merely inconvenienced, perhaps damaged. He can always reach his destination by other streets. But if the street which is graded is his only outlet, as for instance where his only exit is a private way blocked by the graded street then he can recover. In a very recent case in Missouri, the court held:

> It could not be said that a property owner would have reasonable access to his property, although it does not abut upon the obstructed part of the street, if the street were fully obstructed on either side of his property so that the lines of his lot could be reached (Lewis Eminent Domain, p. 191, 3d Ed.) or, if the property is connected with the obstructed street by a private way and the obstruction rendered the private way of no use. . . .
>
> *Christy* v. *Chicago, B. & Q. R. Co.*, 212 S. W. 2d 476, p. 479.

In the instant case the effect of shutting off the drainage is to destroy the land.

This Court has expressed the same view in *United States* v. *Welch*, 217 U. S. 333. There, a dam placed in a river raised the water of a creek flowing into the river and this water permanently prevented the owner from reaching a private road which was the only way in and out of his farm. The Court held this a taking.

The argument that the Government's right in the submerged land on a navigable stream is not an easement but a predominant right is merely arguing about terms. What we have said is that it has the same legal effect as if there were an easement on the land when the buyer purchased it. The Government's right certainly amounts to an ease-

ment. It may amount to more but in the last analysis it is simply a limitation upon the title to the property. This Court has called it a "qualified title." *Scranton* v. *Wheeler*, 179 U. S. 141, p. 163.

II A LANDOWNER HAS TITLE TO THE MIDDLE OF A NON-NAVIGABLE STREAM BORDERING HIS LAND WITH DRAINAGE RIGHTS THEREIN

A. Under Missouri Law If Land Is Bordered by Non-navigable Stream, As the Court Below Found This Land to Be, the Owner's Title Extends to the Middle of the Stream

In its supplemental brief the Government states that the court below did not find that claimant had a property right in Dardenne Creek which would give it the right to drainage therein. The Court's findings as to this land were: "On May 12th, 1933, plaintiff acquired title to the land described in the petition as Tract No. 1 and on June 10th, 1938, plaintiff acquired title to Tract No. 2" (R. p. 22, Fdg. 3). "The District contains more than 2,500 acres of land and is located on Dardenne Creek, about one and one-half miles from its confluence with the Mississippi River" (R. p. 21, Fdg. 2). "It is practically enclosed by a levee and the railroad embankment, except where it borders Dardenne Creek on the east. Drainage is removed from the district by gravity through 10 outlets" (R. p. 23, Fdg. 6). "The farm is bounded on the south for about one-quarter of a mile and on the east for about one-half of a mile, by Dardenne Creek, which runs along the south border of the farm in a northeasterly direction" (R. p. 27, Fdg. 11). "The natural drainage of plaintiff's farm, for both surface and subsurface water, is southward into Dardenne Creek" (R. p. 28, Fdg. 14). That before the dam was erected "Although vertical drainage from the surface through the profile of the soil on plaintiff's land is slow, it is effective" (R. p. 28, Fdg. 14). It is thus plain from the finding of the court below that drainage of this

entire farm has always been into Dardenne Creek and that Dardenne Creek runs along the border of the land both on the south and east.

It is established law in Missouri that where a non-navigable stream borders land the owner owns to the middle of the stream. In *Bratschi* v. *Loesch,* 330 Mo. 697, p. 704, 51 S. W. 2d 69, p. 72, the court expressed the law of Missouri in the language of Corpus Juris:

> In 9 C. J., page 187, Section 65, it is said: "A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center unless a contrary intent is manifest from the grant of conveyance itself. In such case the stream is regarded as the boundary or monument and the purchaser takes to the middle of the monument as a part and parcel of the grant. The reason for this is obvious. Ordinarily in a conveyance of this nature there is no purpose to be served, in the retention by the grantor of a narrow strip of land in the bed of the stream, and the intent to grant it will be presumed by a conveyance of the adjacent lands bounded 'by' 'upon' or 'along' the stream or other equivalent phrase."
>
> It is well settled that where a non-navigable stream of water constitutes the dividing line between two tracts of land, absent reservations or restrictions in the deeds showing a contrary intent, as we hold was the case here, the possessor on each side owns to the center or thread of the stream. Benson v. Morrow et al., 61 Mo. 345, 350; Whiteside v. Oasis Club, (Mo. Sup.) 187 S. W. 27, 30; Spurrier v. Hodges, supra; Gould on Waters, (3d Ed.) §§194-197, p. 372, et seq.

The deeds show no contrary intent. Neither do the findings of the court below.

B. Rule That Surface Water Is a Common Enemy Does Not Apply Here

Under farming conditions in Missouri the doctrine arose that one owning land had a right to protect himself by all reasonable means from surface water. He could ditch his farm, put up small embankments and that was not making an artificial water course of it, and so long as he did not collect the surface water and throw it in a body on his neighbors' land he was not liable. *Dardenne Realty Company* v. *Abeken,* 232 Mo. App. 945, p. 951, 106 S. W. 2d 966, p. 969.

But there are several reasons why that rule does not protect the Government here. (1) Under Missouri decisions even as to surface water one cannot collect it on his property and discharge it in a body on adjoining property as a dam of the sort involved here would do. (2) It is established in Missouri that where water flows in a regular channel as it did in Dardenne Creek one cannot obstruct its flow and cause it to flow back on another. (3) The obstruction in order to be justified must be directed to protection from surface water as would certainly not be the case of a dam as large and extensive as Lock and Dam No. 26 involved here. We have in our original brief (p. 19) cited the leading case in Missouri establishing these principles, *Keener* v. *Sharp,* 341 Mo. 1192, p. 1195.

C. Government's Paramount Power Could Not Be Defeated by Selling Two Feet Bordering a Navigable Stream

The argument that one whose land was on a navigable stream could sell a strip of the land along the river one or two feet in width and thus defeat the paramount right in it of the United States seems to us a *reductio ad absurdum.* Selling two feet of land and placing of a power plant or a dam within two feet of the navigable river would

be so palpably a use of the river itself that the question would not be arguable.

D. Size of Land Immaterial Insofar As Its Character As Riparian Land Is Concerned

The argument is made that one can recover only for destruction of riparian rights where the injury is to that portion of the land near the river. This argument is based on one decision of the courts of California, and two of the courts of Nebraska. Not one of these cases decide this question specifically. One definitely did not decide the question at all, merely presenting it as a *quaere*, the second after about two hundred pages of discussion including statutes of the state really holds that the question must be determined by the facts in each particular case. These were cases involving irrigation where other owners were injured. A third case involved remote injuries, such as cattle being deprived of water, with little direct relation to riparian rights. These cases certainly would not apply to a case where drainage of a whole farm was through one stream and into that stream water was backed up and pushed against the land forcing water into it blocking all drainage outlets destroying the land for agriculture.

Jones v. *Conn*, 39 Ore. 30, 64 Pac. 855, decides unequivocally that the size of the tract has absolutely no bearing on its character as riparian land.

The proper and modern rule on this question is set forth in Restatement of the Law of Torts, Chapter 41, §44, 3 (c), p. 327.

> c. *Parcel of land.* The phrase "parcel of land" as used in this Section means a continuous tract or plot of land in one possession, no part of which is separated from the rest by intervening land in another possession. The area or size of the parcel is immaterial insofar as its character as riparian land is concerned.

CONCLUSION

We believe a careful perusal of the cases cited in the Government's supplemental brief will convince the Court that they are not applicable to this case.

We respectfully submit that the judgment of the lower court should be sustained.

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